NO. 20066

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL RIZZO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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I

JURISDICTIONAL STATEMENT

On March 18, 1964, a one-count indictment was returned against appellant by the Federal Grand Jury for the Southern District of California, Central Division [C. T. 2-3]. 1/

The indictment charged appellant with wilfully failing to file an income tax return for the year 1957 in violation of Title 26, United States Code, Section 7203.

Appellant was convicted by a jury on January 13, 1965 [C. T. 17], and on January 29, 1956 was sentenced to four months

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1/ C. T. refers to Clerk's Transcript.

in a jail type institution and a $1,000 fine [C. T. 18].

Appellant filed a timely notice of appeal and was granted leave to appeal in forma pauperis by the District Court Judge [C. T. 20, 25].

The jurisdiction of the District Court was predicated on Title 18, United States Code, Section 3231 and Title 26, United States Code, Section 7203. This Court has jurisdiction to entertain this appeal under the provisions of Title 28, United States Code, Sections 1291 and 1294.

II

STATUTES INVOLVED

Title 26, United States Code, Section 7203 provides:

> "Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than

$10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

III

STATEMENT OF THE CASE

Appellant was indicted on March 18, 1964 on the charge of willfully failing to file an income tax return for the calendar year 1957 in violation of Title 26, United States Code, Section 7203 [C. T. 2].

Appellant was arraigned and entered a plea of not guilty on April 13, 1964 [C. T. 4].

Trial by jury commenced on January 12, 1965 before the Honorable John F. Kilkenny, United States District Judge [C. T. 6].

On January 13, 1965, appellant was found guilty by the jury and on January 29, 1965, he was sentenced to four months imprisonment and a fine of $1,000.00 [C. T. 17, 18].

IV

STATEMENT OF FACTS

A. EVIDENCE OF GUILT

The Government and appellant stipulated that appellant had in excess of $600 gross income in 1957 and that at the time of trial

he was 56 years of age [R. T. 59, 183]. 2/

An investigation by the Internal Revenue Service began in 1956 into the matter of appellant's failure to file income tax returns for the calendar years 1950 through 1955 [R. T. 91]. In July of 1956 appellant admitted that he was aware that he must file a return if he has in excess of $600 of gross income [R. T. 92]. Later that year he agreed that he had approximately $3500 of income each of those years and to the amount of tax owing, although he did not file returns for any of those years [R. T. 115, 125, 118].

At the same time that appellant agreed that he had income for those years, the Revenue Agent advised him to file a 1956 return in April of 1957 [R. T. 116]. None was filed [R. T. 88].

In early 1958 another agent talked to appellant regarding collection of appellant's delinquent taxes and requested appellant to file his 1957 return with the Agent [R. T. 75-76]. Appellant did not file a return with the agent or in the district where he resided [R. T. 77, 87].

In a 1963 interview with still another agent appellant stated that he filed a 1957 California State Income tax return [R. T. 104]. No such return was filed [R. T. 111].

Appellant's accountant testified that he had been preparing appellant's tax returns from 1954 through 1962 [R. T. 136]. However, when he gave appellant his 1954 and 1955 returns, appellant tore them up and stated that he did not have any income, only loans,

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2/ R. T. refers to Reporter's Transcript.

although appellant later agreed with an Internal Revenue Agent that he had approximately $3,500.00 income in each of those years [R. T. 142, 151, 115].

The accountant did testify that he had a copy of a 1957 return in his file, but that he did not know if it was mailed or when it was typed [R. T. 136, 146, 148]. Moreover, it was the accountant's practice, if a tax were owed to give the return to the taxpayer, with an envelope for mailing [R. T. 147, 137].

The accountant's copy of appellant's 1957 return shows that $575.38 was due [Exhibit #1].

B. PRODUCTION OF FILES AND STATEMENTS. [3]

Prior to the trial Government Counsel lodged with the Court all witnesses' statements that if believed, should be produced under Title 18, United States Code, Section 3500, and all other available witnesses' statements for an in camera determination [R. T. 40]. The Court then ordered all of the statements furnished to the defendant [R. T. 55].

3/ Appellant suggests in the first paragraph of page 20 of his brief that the Government withheld certain documents seized from appellant or furnished by his accountant. The Court on November 30, 1964, ordered the Government to lodge all such documents a few weeks prior to trial [3rd Supplemental Transcript, p. 16]. The Government did lodge all such documents which it claimed it had in its possession [R. T. 47]. There was no testimony or offer of proof from the appellant that the Government had obtained documents which were withheld.

The only witness upon whom a demand was made for notes of an interview with appellant was ex-Internal Revenue Agent Hyman Kosman 4/ who testified to appellant's admissions as to income during the years 1950 through 1955 and his advice to appellant to file a 1956 return, which took place in the later part of 1956 or early part of 1957 [R. T. 113-116, 129].

At the time of this demand Government counsel represented that the agent's notes and report had been destroyed but that a copy of his report was in appellant's accountant's files which had been lodged with the Court [R. T. 129-130].

The Chief of the Audit Division then testified, in the absence of the jury, that he made a search of his records and found no records concerning appellant [R. T. 132].

Following the verdict the Court held a special hearing to determine whether the notes qualified as statements within the meaning of the act and if so whether they were destroyed in good faith [R. T. 235-273].

At this hearing the Chief of the Audit Division testified that his Division makes between fifty-five to sixty thousand audits each year [R. T. 237]. He further testified that within six years after a Revenue Agent has submitted a report, the entire file is destroyed pursuant to regulations of the Internal Revenue Service [R. T. 236]. The copy of Agent Kosman's report taken from the accountant's files was prepared on March 6, 1957 and mailed on June 18, 1957

4/ The transcript incorrectly spells the agent's name Cosman.

[R. T. 250-251] and that all such reports would have been destroyed [R. T. 251].

Mr. Kosman testified that he did not use his notes in preparing the report or make any statement from them [R. T. 254]. He also testified that once he sends in his report and it is approved, the investigation is closed. It is then placed in the closed files [R. T. 258]. Mr. Kosman was only involved in the years 1950 through 1955 [R. T. 255].

At a later time Mr. Kosman testified that he would not make substantially verbatim notes of the conversation but only sketchy notes from which he could determine appellant's living expenses for the years in question [R. T. 267-268].

Later that day the Court found that the notes were not a statement within the meaning of the act and that they had been destroyed in good faith [Order dated January 14, 1965].

V

ARGUMENT

A. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CONVICTION.

Appellant now, for the first time on appeal, questions the sufficiency of the evidence. 5/

5/ At the trial no motion for judgment of acquittal was made either at the close of the Government's case in chief or at the close of all the evidence. This Circuit has repeatedly held that the failure to make such a motion precludes an attack upon the (continued)

The Government fully concedes that to establish wilfulness, more must be shown than that the defendant was careless, inadvertent, or in good faith believed that he did not have to file a return. United States v. Murdock, 290 U.S. 389 (1933).

"Wilfulness" as used in the misdemeanor statute here involved has been defined on several occasions by this Circuit to have a different and lesser meaning than when used in a felony statute.

> "In the definition given, the trial court began with the statement that 'wilful' as used in the misdemeanor counts means with a bad purpose, which standing alone would meet appellant's criticism, but it is argued that the addition of the words 'or without grounds for believing that one's act is lawful or without reasonable cause, or capriciously, or with a careless disregard whether one has the right so to act,' so watered down the meaning of the term 'with a bad purpose' as to render the instruction erroneous. We conclude that the word 'wilful' as used in the misdemeanor statute means something less when applied to a failure to make a return than as applied to a felony non-payment of a tax. This being true, then the words used in the instruction defining 'wilful' as

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5/ (continued) sufficiency of the evidence on appeal. Hardwick v. United States, 296 F. 2d 24 (9th Cir. 1961); Ege v. United States, 242 F. 2d 879 (9th Cir. 1957); Joseph v. United States, 145 F. 2d 73 (9th Cir. 1944), cert. den. 323 U.S. 776.

relates to a misdemeanor adequately and clearly point up that difference."

Abdul v. United States, 254 F. 2d 292 (9th Cir. 1958), cert. den. 364 U. S. 832.

While, as appellant points out in his brief, Abdul, supra, was reversed, the reversal was solely on the grounds that Government counsel was permitted to ask an improper question.

In a subsequent case, Martin v. United States, 317 F. 2d 753 (9th Cir. 1963), this Court rejected an attack upon the sufficiency of the evidence where the defendant claimed that he didn't think he had to file a return in view of his meager income. There the evidence showed that the defendant was a college graduate and had received withholding statements from his employer and statements from a brokerage firm with instructions that they be retained for income tax purposes. This Court, in affirming the conviction, stated at 317 F. 2d 755:

> "Assuming for the moment that appellant was in fact unaware of the exact amount of income one must have before reporting is required, we can only wonder why in light of these warning signs he made no effort to find out. We conclude that the evidence was sufficient to establish that he did not have reasonable cause for believing he was not subject to the reporting requirements and acted with a careless disregard of whether he was subject to those requirements."

The Court also restated the rule of Abdul, supra, at 317 F.2d 754:

> "In this regard, 'willful' for the purpose of 7203 means 'with bad purpose or without grounds for believing that one's act is lawful or without reasonable cause or capriciously or with a careless disregard whether one has the right so to act."

In the instant case appellant was in contact with Internal Revenue agents for almost three years prior to April 1958 during which time he admitted he knew the requirements, was told to file for 1956 and was told to file for 1957 and yet, according to the evidence, never filed a single federal income tax return for the years 1950 through 1957. Moreover, he tore up his returns for 1954 and 1955 and later admitted that he had over $600 income in each of those years as well as the prior years. 6/

Edwards v. United States, 321 F.2d 324 (5th Cir. 1963), relied upon by appellant reversed,in a two to one decision, a conviction under this statute for failure to pay the special wagering tax on the ground that there was no evidence that the defendant was in any way aware of such an obligation. The court did suggest

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6/ In reviewing the sufficiency, the evidence should be viewed in the light most favorable to the Government.

Schino v. United States, 209 F.2d 67 (9th Cir. 1954);

Glasser v. United States, 315 U.S. 60 (1941).

that proof of knowledge of the obligation to file may not even be necessary in an income tax case under this section. 7/

With respect to the proof of the actual failure to file, the accountant testified that he normally would have given the return to the taxpayer for mailing if a tax was due, as his copy of the return indicated. Moreover, when viewed in the context of appellant's prior conduct, the negative search would seem conclusive. In this regard, one considers how a failure to file could ever be proved without an admission were it not for a negative search. Counsel cites no case which suggests that a negative search of official records is an improper or inadequate method of proving that something didn't happen.

B. THE COURT DID NOT ERR IN FAILING TO STRIKE THE TESTIMONY OF THE WITNESS KOSMAN NOR IN NOT DECLARING A MISTRIAL.

The evidence produced both at trial and at the special hearing was sufficient to establish that Kosman's notes were destroyed in good faith. There was evidence that Kosman was a Revenue

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7/ "We may assume, without deciding, that in cases involving nonpayment of income tax (citations) the almost universal knowledge of the existence of that tax would justify placing the initial burden of proof of ignorance on the defendant." 321 F.2d 324, 326.

An earlier case from the Fifth Circuit, relied upon by appellant specifically, rejected this Circuit's construction of the term willfull in 7203. Haner v. United States, 315 F.2d 792 (5th Cir. 1963).

Agent, concerned only with the assessment of appellant's taxes for the years 1950 to 1955, he was not concerned with any year after; he was not conducting a criminal investigation; he finished his dealings with appellant and made his report in March of 1957; in the normal course of operation of the Internal Revenue Service, the Revenue Agent's report would have been destroyed in 1963; and appellant was not indicted until March, 1964. Moreover, appellant does not here assert that the notes were destroyed in bad faith.

Appellant contends that good faith is not enough, and that the testimony of a witness must be forever barred if, for legitimate reason, his notes or a report based upon them, are not available. He argues that Ogden v. United States, 323 F.2d 818 (9th Cir. 1963) and Killian v. United States, 368 U.S. 231 (1961), are distinguishable on the grounds that reports based upon the notes were available.

Appellant quotes the following from Ogden, supra, to establish that the issue here is unresolved:

> "Whether sanctions are to be imposed if a producible statement has been destroyed in good faith and the information in the destroyed document relevant for impeachment is not otherwise available, and whether sanctions are to be imposed without regard to prejudice if destruction is in bad faith may remain open issues. . . ."
>
> 323 F.2d 818, 820-821.

However, in the footnote to this statement, 8/ this Circuit recognized that the First Circuit has held and the Second Circuit indicated that such situations do not give rise to sanctions. In Campbell v. United States, 303 F.2d 747 (1st Cir. 1962), cited in this footnote, the Court, on rehearing stated:

> "In our opinion of November 7, 1961, 296 F.2d 527, we said that the Jencks Act imposed no duty on the agents of the FBI to take the statements of witnesses and no duty, at least in the absence of bad faith, to keep any statements that might have been taken. Therefore, there being no evidence from which it could possibly be found that Toomey destroyed his notes in bad faith, the question propounded by this petition for rehearing whether his notes, had they not been destroyed, would be producible under Section (e)(1) of the Act is academic."
>
> 303 F.2d 747, 751.

In the second case referred to in the footnote, United States v. Aviles, 197 F. Supp. 536 (S.D. N.Y. 1961) Judge Bicks stated

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8/ "As noted above, the Court of Appeals for the First Circuit indicated in its second Campbell opinion (296 F.2d 527, at 531-534) and held in its third (on petition for rehearing, 303 F.2d at 751) that sanctions do not apply in these circumstances. The Court of Appeals for the Second Circuit has indicated, though not held, that it agrees. See, e.g., United States v. Aviles, 315 F.2d 186, 188 (2d Cir. 1963), adopting opinion of Judge Bicks at 197 F. Supp. 536, 553-558 (S.D. N.Y. 1961); United States v. Greco, 298 F.2d 247, 250 (2d Cir. 1962)." 323 F.2d 813, 821.

at 197 F. Supp. 555 yo 556:

"Petitioners contend that the government's failure to have produced or satisfactorily accounted for these notes constitutes a Jencks Act violation sufficient to entitle them to a new trial. It will be noted that in the recent case of Campbell v. United States, 1961, 365 U.S. 85, 81 S. Ct. 421, 5 L. Ed. 2d 428, the Supreme Court left open the question as to whether destruction for improper motives or in bad faith should be regarded as the equivalent of non-compliance with an order to produce or whether any destruction without regard to the circumstances should be so regarded. § 3500, by its very terms, refers to a 'statement * * * of the witness in the possession of the United States.' In the Court's view, it was not the intention of the Congress in enacting § 3500 to require the government to retain in its files ad infinitum, with penalizing consequences for the failure so to do, the numerous notes taken during untold interviews in connection with the investigation of countless criminal matters (citation). This is not to state or imply that the government may with impunity and for improper ends destroy notes in an attempt to deprive criminal defendants of that which the Congress has seen fit to grant them. The Court holds that the good faith destruction of notes not within

the ambit of the Jencks statute is not the equivalent of non-compliance with an order to produce."

It should be noted that in the instant case Agent Kosman was not even engaged in a criminal investigation and was in no way involved in the investigation for the year out of which this charge arose.

VI.

CONCLUSION

For the reasons herein stated the judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Arthur I. Berman

ARTHUR I. BERMAN